No. 12278

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LESTER V. HURLEY,

Appellant,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LIMITED,

Appellee.

PETITION FOR REHEARING.

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SOUTHERN CALIFORNIA EDISON COMPANY, defendant and appellee in the above entitled proceeding, hereby petitions the above entitled court that it grant a rehearing to said appellee as to matters decided adversely to it by this court's decision herein of May 25, 1950, and on the grounds more particularly hereinafter set out. Counsel for appellee hereby certify that in their judgment this petition is well founded and that it is not interposed for delay.

I.

The Findings of the Trial Court That Defendant Had No Actual Knowledge Nor Reason to Believe That Any Fraud Had Been Perpetrated on Plaintiff, Makes Section 1475 Civil Code Applicable, Even Though the Purported Signatures of Plaintiff on Stock Assignments Were Forgeries.

If we understand correctly the effect of this court's decision herein, it is that even though defendant had no knowledge nor reason to know of any fraud practiced upon plaintiff, nevertheless the payment of dividends upon stock owned by plaintiff as one of three joint tenants to another of the co-tenants, does not discharge defendant's obligation, so far as plaintiff is concerned. This result is based upon the assumption that the stock certificates evidencing plaintiff's ownership of this stock had been presented to the defendant for transfer to the other two joint tenants with forged sigatures of plaintiff thereon.

If a stockholder's certificate is transferred by the corporation on a forged signature, he has the choice of two remedies against the corporation. He may either bring an action against the corporation for damages for conversion or an action to compel the corporation to replace the shares in his name. The corporation's liability is not based upon any negligence or bad faith in failing to recognize the forgery. Questions of good or bad faith are immaterial. (Fletcher Cyclopedia Corporations. Vol. 12, pp. 455 and 500.) It follows that in event of a forgery, it is not correct to state that the corporation is liable because it is charged with knowledge of the forgery. It is liable because in the absence of a genuine signature, the stockholder has not authorized any transfer.

But plaintiff has not brought any action for conversion, and even if he had, he would have found it barred by Statute of Limitations. (*Wright v. Ward,* 65 Cal. 525, 4 Pac. 534; *First Nat. Bank v. Thompson,* 60 Cal. 2d 79, 140 P. 2d 75.) He could have taken the position that the issuance of new certificates on forged signatures destroyed the joint tenancy. But it was to his advantage to take the position that he was at all times a joint tenant of the stock in question. By taking this position he was benefited as a result of the subsequent death of one of his joint tenants, and, as a result became the owner of one-half of this stock.

Both in this action and in his earlier action against his co-tenant Hurley, plaintiff has sought to maintain this position as a joint tenant. At no time has he made any claim of wrongful conversion of his stock. He must not be allowed to confuse the different types of relief to which he might be entitled. In maintaining his position as a joint tenant of the stock in question, his rights as such tenant and the obligations of defendant to him are no different, because of the fact he might have brought an action for conversion. In spite of the presence of his forged signatures, assuming they were in fact forged, and the issuance of new certificates to the other two joint tenants, the plaintiff continued to be a joint tenant in this stock, so far as all parties involved were concerned.

In this action plaintiff is suing only on a debt arising from dividends he claims were due him as a stockholder. As is pointed out in both the brief of appellant (pp. 24-26) and that of appellee (p. 18) herein, dividends when declared become a debt due from the corporation to the stockholders, the act of declaring a dividend operating as

an actual severance of the dividend from the stock. In this action on a debt due joint tenants, as distinguished from one for conversion of his stock interest as a joint tenant, the good faith of defendant, as an issue of fact, is a most important issue. In view of the position plaintiff has taken, "the great principle that no one can be deprived of his property without his assent," is not here involved. His property interest as one of three joint tenants to whom a debt is due from defendant is as a matter of law subject to the provisions of section 1475 Civil Code.

This court's decision states "the Company was under a continuing duty to treat Hurley as a stockholder," but it does not indicate any particular in which defendant failed to do so. Defendant regularly paid the dividends on the very stock thus owned by plaintiff to one of his co-tenants without having knowledge or reason to know of any fraud. In so far as can be determined from the record herein, neither Hurley nor defendant did anything or failed to do anything differently than would have been done if these new certificates had not been issued.

In the decision herein it is stated that "The Company must have known from the circumstances that no portion of these sums would ever reach Hurley." There is surely no presumption that Hurley's co-joint tenant and his statutory trustee to whom these dividends were paid, would not make a proper accounting. The statutory presumption is to the contrary. (Section 1963(1) Civil Code.) The issuance of the new certificates did not relieve her of that duty. The presence of any actual knowledge or reason to know on the part of defendant that such accounting would not be made is negatived by the express findings of the trial court. Even the presence of forged signatures

does not of itself impart knowledge or reason to know they are in fact forged, and their presence, assuming again they were forged, did not do so as is shown by the trial court's findings.

In so far as the presence of a forged signature is concerned, we submit that there is no material difference, in the situation here presented, than would be involved in the case of a check payable to two payees jointly, which is presented for payment by one payee, duly indorsed by him, but with the signature of the other payee forged. In such a case, if the presence of the forged signature were to constitute notice, actual or constructive, of fraud upon the payee whose signature is forged, payment to the other joint payee should not discharge the obligation to the payee whose signature is forged. The case of *Dewey v. Metropolitan Life Ins. Co.,* 256 Mass. 281, 152 N. E. 82, presents this problem, and it there held that the obligation is discharged under these circumstances. In that case, the Plaintiff, whose signature, by mark, was forged, failed to recover after the check was cashed by Ryan, the other joint payee. The court, after referring to the same rule of common law, which is codified by section 1475 Civil Code, stated "that the contractual rights against the insurance company, which were created by the delivery of the check to the authorized agent of Plaintiff, were extinguished on delivery of the check to the bank, when it cashed it without notice of any limitation on the right of Ryan to receive the proceeds of it." If the presence of a forged signature of one joint tenant payee of a check gave no notice that the other payee would not account to his co-payee, neither in the case at bar did defendant have any notice that a proper accounting would not be made.

In applying the common law exception to section 1475, Civil Code, as set out in section 131 (2) Restatement of Contracts, it is actual knowledge of fraud or reason to know of fraud as a matter of fact, that is the material element. We are not here dealing with any kind of theoretical knowledge which is chargeable to one as a matter of law. The issue is purely one of fact, and the trial court decided that issue in Defendant's favor after having granted a new trial *specifically for the purpose of trying the issue of* "whether or not Defendant knew or had reason to know of the fraud perpetrated upon Plaintiff by Plaintiff's co-tenant, Elizabeth J. Price" [Tr. Rec. p. 34]. In the absence of the testimony before the trial court, we are at a loss to know how, on this appeal, this finding of fact can be disregarded.

Reference is made in the court's decision to the "illustration" given of the application of section 131 Restatement Contracts as tending to justify the result reached by the court in its decision. We submit that a careful analysis of the provisions of this "illustration" does not support such conclusion. It is apparent from the facts there stated that D actually knew that A had no right as against B and C to release the claim against D except upon the receipt of *money*. It was only upon the receipt of *money,* as called for by the nature of the obligation, that A could make the division agreed to by A, B and C, and D had actual knowledge of this fact. A, after the discharge of the debt due him individually from D, had nothing from such a settlement to share equally with B and C. Such a settlement was fraudulent as against B and C, and D knew it was.

This illustration is not analogous to the facts in the case at bar, as several vital facts present in the illustration are missing in the case at bar. Defendant had no

knowledge of any agreement between the joint tenants as to what, if any, division was to be made between them of the dividends due from Defendant. Defendant's obligations were performed by cash payment and not by cancellation of any claims it might have against one of the joint tenants. Defendant had the best of all reasons for believing it was agreeable to Hurley to continue payments to Mrs. Price, namely written instructions over Hurley's signature to do so. In the absence of actual knowledge on the part of defendant or reason to know of fraud against Hurley, Defendant had no reason to know Mrs. Price would not account to him on the basis of what he was entitled to receive out of the *money* paid her. The fact that Hurley no longer appeared as one of the joint tenant owners of the stock on the defendant's books afforded no information to Defendant that the other joint tenants claimed ownership therein to the entire exclusion of Plaintiff. It is a matter of common knowledge that corporate stock frequently stands of record on the books of the issuing corporation in the names of others than the beneficial owners. This court should here take judicial knowledge of this practice in connection with the bearing it has on the finding of the trial court that Defendant had no knowledge or reason to know of fraud.

The cases of *Weir Plow Co. v. Evans* (Tex. Civ. App.), 24 S. W. 38; *Lemiette v. Starr,* 66 Mich. 539, 33 N. W. 832; *Remington v. Eastern Ry. Co.,* 109 Wis. 154, 85 N. W. 321, and *Rooks v. Satnaland,* 33 Ga. App. 8, 124 S. E. 904 are cited by the court in support of its ruling. In the *Weir Plow Co.* case, the court held proper a jury instruction that either member of a partnership has the right to settle, compromise and release claims due the firm, unless they further find the release was executed without consideration accruing to the partnership, or that the part-

ner executing the release "was induced, in whole or in part, to sign said release by reason of a private benefit and gain accruing to him alone, and not to the benefit of "the partnership," and that such facts were known to the Defendant (in whose favor the purported release ran) at the time it procured said release."

In the *Lemiette* case the suit was on an obligation due two partners. Defendant urged as a defense a note in favor solely of Lemiette, one of the partners, given by Defendant in payment of the partnership claim on the assurance of Lemiette that "there was nothing coming" to the other partner out of the amount due the partnership. But previous to the giving of this note, the partners had requested the debtor on several occasions to pay the debt, but he had not done so. On appeal after judgment for Defendant, the court reversed the judgment stating that Lemiette "could not, by collusion with the debtor of the firm, obtain a security in his own name, and for his own benefit, to the exclusion of his partner."

In the *Remington* case, the plaintiff (R) and defendant Murphy (M) were law partners. M on behalf of the partnership, entered into an agreement with defendant railroad company for the performance of legal services by the partnership for the railroad, but reported to R the amount of compensation to be received at a less amount than actually agreed upon. The railroad company also falsely stated this amount to R, as alleged by M. This was held to be collusion between M and the railroad to deceive R. No accounting of the affairs of the firm had been made and R joined M as a defendant because he refused to join as a plaintiff and sought recovery for reasonable value of the services rendered, and on appeal the holding was in favor of R.

In the *Rooks* case, reported only by "Syllabus by the Court", it appears that two persons entered into an agreement with the owner of property whereby the two were authorized to sell the property at any price above a fixed sum and were to receive one-half of the difference between that sum and the amount for which the property was sold. After the sale of the property the owner executed a deed to other property to one of the two in satisfaction of the claim for both for commissions, and it stated such a settlement was not binding upon the other unless he authorized or ratified it. But the report of this case, being limited to a meager "Syllabus by the Court," we find somewhat difficult to understand. The action was apparently brought by Rooks, who was not the one to whom the conveyance was made, against Stanaland, the owner of the property sold by these two. Judgment in the lower court in favor of Stanaland, was affirmed on appeal, which seems to indicate that the trial court found on the evidence that the plaintiff either authorized or ratified the settlement made by defendant. If the one who did not receive the conveyance in place of a payment of cash as a commission, authorized or ratified such a settlement, the claim of both was discharged. So far as we can determine nothing more was involved in the *Rooks* case.

We have made the rather lengthy analysis of section 131 and the "illustration" thereunder and reviewed the cases cited in the decision herein, because we are convinced they do not support the conclusion that defendant, having no knowledge or reason to know of fraud practiced on Hurley, is deprived of the protection of section 1475 Civil Code. In the opinion it is stated that this section "should have effect so long, and only so long, as the obligor may rightly assume that the one obligee to whom performance is furnished will account to the others." We submit

the obligor should be required to make no assumption in this regard in order to claim the benefit of section 1475 Civil Code, and that even an erroneous assumption by obligor that the obligee will or will not account to his co-joint tenants is immaterial. The applicability of this section is not determined by whether the obligee receiving performance accounts to his co-obligees. If the words above quoted were intended to mean that an obligor who knows or has reason to know that fraud is being or will be practiced, by the obligee receiving performance, against his co-obligees by not accounting, we concede this is correct, but not applicable to this case.

But we fail to comprehend how this court reaches its conclusion that "Here the Company had such knowledge. It knew Mrs. Price intended to and would keep the money." To reach any such conclusion it surely must at least appear affirmatively that defendant *in fact* knew or in the light of all of the circumstances had reason to know (1) of the forgery of plaintiff's signature, if any there was, and (2) that Mrs. Price, whether she knew of the forgery or not, would with the object of defrauding plaintiff, render no account to him. The possibility of defendant knowing or of having reason to know these matters are negatived by the findings of the trial court. In order to secure the protection of 1475 Civil Code defendant was not bound "at its peril" to determine correctly that plaintiff's signature was genuine. (*Dewey v. Metropolitan Life Ins. Co.*, 256 Mass. 281, 152 N.E. 82.)

The accumulated wisdom of the common law is embodied in section 1475 Civil Code as providing the only satisfactory means of satisfying an obligation due several joint obligors, and it should be the policy of the courts not to enlarge the exceptions to the application of this section.

II

In the Absence of Knowledge or Reason to Know by Defendant of Fraud Practiced upon Plaintiff in Securing His Signature on the Dividend Orders, Even Though Plaintiff Was a Minor at the Time, Plaintiff Had no Right to Disaffirm as Against Defendant.

The decision herein holds that plaintiff's disaffirmance of the dividend orders within a reasonable time after attaining majority rendered these orders void *ab initio*, even as against defendant. Assuming that these orders are in the nature of contracts of a minor (as this court apparently assumes), we submit that they can be considered only in the nature of assignment of an obligation due the minor from defendant. Under these facts, section 170(2) c of Restatement Contracts applies. It provides as follows:

> "(2) Except as stated in Subsection (4) an obligor is discharged from any duty to the obligee or to any assignee, if he obtains for value, by performance or otherwise, a discharge of the duty
>
> * * *
>
> (c) from any holder of an assignment voidable b ythe assignor because of infancy, insanity, fraud, duress, mistake or illegality, if the discharge is obtained in good faith prior to avoidance of the assignment by the assignor, and the obligor neither knows nor has reason to know facts showing that the assignment is voidable".
>
> (Restatement Contracts, section 170(2) (c)).

The exception noted in 170 (4) has no application in this case.

The express findings of the trial court show that defendant had no notice that plaintiff was a minor [Tr. Rec. pp. 53-54], nor of any fraud [Tr. Rec., p. 57]. It did not know that these assignments were voidable either because of infancy or fraud. It follows that defendant under the rule of common law embodied in Section 170 (2) c was discharged of its obligations as debtor to plaintiff by performance of the obligation to Mrs. Price, as plaintiff's assignee.

Section 170 (2) c was not, because of our oversight, referred to in Appellee's Brief. But on pages 27 to 35 of that brief, we do advance argument and cite authority in support of this common law rule. The cases cited in the court's decision on their facts are not, in conflict with this rule. None of the cases there cited deals with the question of the right of a minor to disaffirm a voidable assignment of a credit due him as against his debtor after payment has been made by the debtor to the assignee. The rule of law applied in these cases must be limited to the facts presented in each case. *Flittner v. Equitable Life Assur. Soc.,* 30 Cal. App. 209, was a suit to recover premiums on a life insurance policy taken out by a minor under 18 years old, and no problem of assignment was involved. *Pollock v. Industrial Acc. Comm.*, 5 Cal. 2d 205 grew out of an industrial accident to a 15 year old boy on account of which an award was made by respondent commission in a proceeding brought by the boy through his guardian *ad litem.* All sums due under the award were, before he reached 18 years of age, either paid to him or at his request deposited by the insurance carrier of the employer to the boy's credit with a savings and loan association which shortly thereafter became insolvent. The insurance carrier had contested the award and knew the boy was a minor. In its opinion, the court treats

the payments as if made directly to the boy and holds that payment to him was ineffective because not made to a lawfully appointed guardian. But in determining the effect of this decision, it must be kept in mind that the boy was under 18 years. Therefore, he had the right to disaffirm under Section 35 Civil Code without returning the consideration received by him. If he had been over that age, he would have been obliged under this section, as a condition of disaffirmance, to restore

> "the consideration to the party from whom it was received, or paying its equivalent."

If the boy had been 18 when receiving payment, no advantage could accrue to him by returning the payment and then demanding repayment. Nothing in the *Pollock* case can be construed as being in conflict with Section 35 Civil Code or the numerous California cases decided in accordance with that section, even though isolated passages of the opinion seem to have that effect. None of the Missouri cases cited involves an assignment by a minor or the question of the effect of a disaffirmance of a voidable assignment after performance by the debtor to the assignee.

In appellee's brief we took the position that the dividend orders must be construed either as a direction from a creditor given under Section 1476 Civil Code as to manner payment is to be made by his debtor, or as an assignment of the debt (pp. 27-35). The order of payment described in Section 1476 Civil Code obviously has the effect of an assignment and should be considered as such. Williston on Contracts, Rev. Ed. Vol. 2, p. 1223 states,

> "If, however, an order which specifically requests payment of all or part of a particular fund or claim to which the drawer is entitled is delivered to a payee,

> who is not the drawer's servant or agent, the order is interpreted as an assignment,"

citing in support of this statement many cases, including *Wheatley v. Strobe*, 12 Cal. 92, cited on page 24 of Appellee's Brief to this effect.

For additional authorities in support of the rule found in Restatement Contracts, Section 170 (2) c we refer to:

Williston on Contracts, Rev. Ed. Vol. 2, p. 1249;
6 C. J. S. 1153, Sec. 98; 1163, Sec. 109;
5 C. J. 960, Sec. 147.

As expressly indicated in Section 170 (2) c, the rule is applicable to all voidable assignments, regardless of why they are voidable, including those made by minors. Any right of avoidance an assignor may have after payment by debtor to assignee, must be limited to a rescission as against the assignee. This does not render the assignment void *ab initio* as against the debtor who without notice of the right of the assignor to avoid the assignment, has already paid the assignee.

A debtor presented with an assignment, having no notice that the assignor has and has exercised a right to disaffirm, is bound to the assignee.

This is pointed out in the two cases of *Casey v. Kastel* 237 N.Y. 305, 152 .....E. 671, 31 A.L.R. 995 and *Carolina Telephone & Telegraph Co. v. Johnson,* 168 F. 2d 489, 3 A.L.R. 2d 870, cited on page 31 of appellee's brief herein. Both of these cases involve the question of liability of a corporation for transferring stock belonging to a minor, where the minor had made an assignment of the stock. Both hold there is no liability in the corporation, where the minor disaffirms after the corporation issues a new certificate.

In the *Casey* case it is stated:

"The United States Steel Corporation is not in the same position as the defendants who sold the infant's stock on her behalf. When it transferred the stock on its books to the ultimate purchaser and canceled the infant's stock certificate, it did a valid act. No statute, as in *Merriam v. Boston C. & F. R. R. Co.*, 117 Mass. 241, made the transfer illegal. It acted under her authority without notice of her incapacity, in good faith, and without negligence. It was not bound to inquire whether the transfer was voidable, for nothing put it upon inquiry. It received nothing and retained nothing for which it can be called upon to account. It appropriated no property to itself. It was an intermediary in a sale by others; a conduit for the transfer of title. It destroyed a muniment of title merely, and did not deprive the plaintiff of her rights in the stock itself, which exists apart from the certificate. *Zander v. N. Y. Security & Trust Co.*, 178 N.Y. 208, 212, 70 N.E. 449, 102 Am. St. Rep. 492. It was guilty of no conversion after disaffirmance. Plaintiff might, with equal effect, have intrusted the certificate to a messenger to deliver to the purchaser. The messenger would have exercised no dominion over her property, done her no wrong, and made no gain, and, even if she afterwards disaffirmed the sale, could not be placed in the position of a tort-feasor. While there is no definite test of conversion of universal application (*Bramwell B, Burrows v. Bayne,* 5 Hurl. & N. 296, 308), the courts have not gone so far as to say that the acts of a corporation in recording a transfer of stock amount to a conversion of the stock.

The transfer being voidable only and legal and valid when made, the corporation had no right to refuse a transfer. *Smith v. Railroad,* 91 Tenn. 221,

239, 18 S.W. 546. It could have been compelled by the purchaser by recourse to the proper remedy to make it. *Travis v. Knox Terpezone Co.,* 215 N. Y. 259, 264, 109 N. E. 250, L. R. A. 1916A, 542, Ann. Cas. 1917A, 387."

Casey v. Kastel, 237, N.Y. 305, 142 N.E. 671, 31 A.L.R. 995.

We submit no distinction can be drawn between an assignment of stock by a minor and assignment of a debt by a minor.

For the reasons above shown, a rehearing should be granted herein.

Respectfully submitted,

CHAS. E. R. FULCHER,
CAROL G. WYNN,
FULCHER & WYNN.

By CAROL G. WYNN,
Attorneys for Appellee.

Certificate of Counsel.

I, Carol G. Winn, counsel for Petitioner in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

CAROL G. WINN,
Attorney for Petitioner.